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October 31, 2000

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
360 James Robertson Parkway
Nashville, TN 37201

Re: Tariff Filings by all Telephone Companies Regarding Reclassification of
Pay Telephone Service as Required by FCC Order 96-439
Docket No. 97-00409


Dear Mr. Waddell:

Please accept for filing the original and thirteen copies of a Memorandum of Law in Support of the Motion for Prejudgment Interest filed on behalf of the Tennessee Payphone Owners Association in the above-captioned proceeding. Copies have been provided to parties of record.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:



Henry Walker

HW/nl
Enclosure

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

**IN RE: TARIFF FILINGS BY LOCAL EXCHANGE COMPANIES TO COMPLY
 WITH FCC ORDER 96-439 CONCERNING THE RECLASSIFICATION OF
 PAY TELEPHONES**

DOCKET NO. 97-00409

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PREJUDGMENT INTEREST**

The Tennessee Payphone Owners Association ("TPOA") files this Memorandum of Law in support of its Motion for Prejudgment Interest.

I.

BACKGROUND

As this regulatory body is aware, this proceeding arises from a decision of the Federal Communications Commission three years ago requiring that incumbent local exchange carriers (LECs), such as BellSouth Telecommunications, Inc. (BellSouth), establish cost-based rates for pay telephone access lines. In an Order released April 15, 1997 (DA-79-805) in docket 96-128, the Common Carrier Bureau declared that, in order to receive "dial around" compensation for LEC-owned payphones, each LEC must certify that, among other things, it had filed "cost based" intrastate payphone rates, effective April 15, 1997. *Id.*, at paragraph 10. After the LECs claimed they had been given insufficient notice of that requirement, they sought a waiver from the FCC and persuaded the agency to allow pending state tariffs to become effective, on a temporary basis, pending further state and federal review. The LECs promised that, should any state later decide to reduce a LEC's payphone rates, the LEC would "reimburse or provide

credit to those purchasing the service back to April 15, 1997.” *Id.*, at paragraph 14. Based on that promise, the FCC granted the LECs’ request and allowed the LECs to begin immediately receiving dial around compensation. The Order concluded, “A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than existing tariffed rates.” *Id.*, at paragraph 25. In response, the Authority opened this proceeding to set pay telephone rates in accordance with the FCC’s direction and, as required by federal law, declared that the final rate, once determined, would apply retroactively to April 15, 1997. Thus, if the final payphone rate set in this proceeding for BellSouth is lower than BellSouth’s current payphone rates, members of TPOA will receive a refund of all overpayments to BellSouth.

In addition to a refund of the original sum overpaid, however, the TPOA has also moved for an award of prejudgment interest to compensate the TPOA for the loss of use of the sums refunded.¹ To the extent the TRA orders a reduction in BellSouth’s current rate, the TPOA has not only lost the money overpaid, but also the time value of the money overpaid. BellSouth, on the other hand, has enjoyed not only the benefit of receiving dial around compensation since April 15, 1997, but has also received the benefit of the excessive rates paid by payphone owners and, presumably, has earned a return on those excess sums for more than three years. As such,

¹ Since, as explained in this brief, the purpose of prejudgment interest is to compensate the plaintiff for the loss of the time value of money, not to penalize the defendant who has had the free use of that money, BellSouth and the other LECs are not prejudiced by the fact that the TPOA did not raise the issue of prejudgment interest until this matter was heard on the merits. Even if the TPOA had never raised the issue, the TRA could presumably have ordered the payment of prejudgment interest *sua sponte*, as a matter of equity and to prevent BellSouth from reaping a windfall. See *Mitchell v. Mitchell*, 876 S.W. 2d 830, 832 (Tenn. 1994), (holding that, where prejudgment interest is secondary to the plaintiff’s main claim, a request for prejudgment interest falls under the category of “for general relief” and does not have to be specifically requested.)

payphone owners cannot truly be made whole and the equities cannot truly be shifted back to a balanced position as was intended by the FCC and the Authority if BellSouth and the other LECs are directed to pay prejudgment interest on the overpayments.

II.

THE LAW

The remedy of prejudgment interest is codified at T.C.A. § 47-14-123. That statute provides that prejudgment interest, up to a maximum effective rate of ten percent per annum, may be awarded as damages in a case “in accordance with the principles of equity.” The standard to be applied in determining whether the “principles of equity” warrant an award of prejudgment interest has been the subject of countless court opinions but was most recently revisited by the Tennessee Supreme Court in Myint v. Allstate Insurance Company, 970 S.W.2d 920 (Tenn. 1998). The plaintiffs in Myint filed suit against their property insurer for breach of contract, bad faith and violation of the Tennessee Consumer Protection Act following the insurer’s denial of the Plaintiffs’ claim for fire damage to their rental property. Among the issues on appeal was whether the trial properly awarded prejudgment interest to the Myints. The Defendant argued that the trial court had not acted properly in awarding the Myints prejudgment interest because 1) the amount due was not certain and because 2) the insurance carrier had a reasonable basis upon which to dispute the Myints’ recovery.

Rejecting the Defendant’s arguments, the Tennessee Supreme clarified that, while the factors cited by the Defendants were relevant factors to be taken into consideration in considering a request for prejudgment interest, they were not dispositive of the issue. Id. at 928. Instead, the primary factor is simply whether the award of prejudgment interest is fair given the

particular circumstances of the case. Id. The Myint Court further explained that “in reaching an equitable decision, a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing.” Id. at 927 (quoting Mitchell v. Mitchell, 976 S.W.2d 830, 832 (Tenn. 1994).

Since the Myint opinion in 1998, Tennessee courts have applied a more liberal standard when considering a request for prejudgment interest. As the Court of Appeals recently held,

As we construe the Myint decision, the Tennessee Supreme Court has shifted the balance to favor awarding prejudgment interest whenever doing so will more fully compensate plaintiffs for the loss of use of their funds. Fairness will, in almost all cases, require that a successful plaintiff be fully compensated by the defendant for all losses caused by the defendant, including the loss of use of money the plaintiff should have received.

Scholz v. S. B. International, 2000 WL 1231430 (Tenn. App. Aug. 31, 2000) *2 (emphasis added).

Prejudgment interest may still be inappropriate, however, if the party seeking interest has been “inexcusably dilatory in pursuing a claim,” “unreasonably delayed the proceedings after suit was filed,” or “has already been otherwise compensated for the lost time value of its money.” *Scholz, supra*, at 4. Those factors are discussed below.

III.

ARGUMENT

- A. Applying the above Standard to the Present Action, the TPOA Is Clearly Entitled to an Award of Prejudgment Interest.

For more than three years, all parties have been aware that BellSouth is legally required to file, and the TRA to approve, “cost-based” rates for payphone service, effective April 15, 1997. The TPOA, however, agreed not to protest BellSouth’s initial filings in April, 1997, in exchange for BellSouth’s promise that there would be a retroactive “true-up” once cost-based rates were finally set. See attached exhibits. Neither the FCC nor the TRA addressed the issue of prejudgment interest, perhaps because no one expected these proceedings to take so long. In any event, there can be no real “true up” unless the time value of money is taken into account. BellSouth will receive a windfall by having the benefit of the TPOA’s money for more than three years. Indeed, if prejudgment interest is not awarded, it will be as if BellSouth had received an interest free loan from April 15, 1997 through the date the refund is ultimately paid. Such a circumstance would not be equitable or consistent with the FCC’s direction that LECs “must reimburse” or “provide credit” to its customers. Reimbursement, as BellSouth itself well understood when it sought and obtained a waiver from the FCC concerning the payment of dial around compensation, means taking into account the time value of money. That is exactly the circumstance that T.C.A. §47-14-123, as recently interpreted by the courts, is intended to remedy.

Finally, none of the three exceptions to the presumption in favor of prejudgment interest appears relevant to this case.

First, the parties promptly initiated this proceeding in April, 1997, as they were required to do by federal law. Second, the party seeking interest has not “unreasonably delayed the proceedings.” TPOA did suggest that the proceedings be stayed pending the TRA’s determination of other, related dockets. As explained in the “Agreed Motion for Continuance” (copy attached), it would have made little sense for the agency to litigate the same issues twice, once in the “permanent pricing” docket and again in this proceeding. The LECs agreed to that proposal and the TRA itself approved the agreed motion. See attached Initial Order. Having agreed to the stay, no LEC should now be able to claim that it was an “unreasonable” delay. Third, TPOA members have not been “otherwise compensated” for the lost time value of their money.

B. As a Matter of Equity, Prejudgment Interest Should Accrue from April 15, 1997.

Once the decision is made to award prejudgment interest, the second issue for resolution is from when interest should begin to run. In its motion, the TPOA offers three relevant and reasonable time periods. The first alternative is for the award of prejudgment interest to run from April 15, 1997. As discussed above, beginning on April 15, 1997, every payment to BellSouth by the TPOA for pay telephone service has been an overpayment to some degree. By agreement, BellSouth’s obligation to “true up” applies retroactively to April 15, 1997. Therefore, the accrual of interest should also apply retroactively to that date.

In Myint, for example, Tennessee Supreme Court upheld the trial court’s decision to award prejudgment interest to the plaintiffs from June 1991, the date on which their loss claim was denied by the defendant, through May 1995, the date of judgment, recognizing that during

that entire time period the defendant had use of funds which the plaintiffs were ultimately legally entitled.

Alternatively, the TPOA proposes that prejudgment interest begin to accrue on any refund awarded beginning March 21, 2000. This is the date on which the TPOA requested that the TRA reconvene the above-captioned proceeding in light of federal and state regulatory developments. By March 2, all parties had the benefit of the FCC's March 2 Order clarifying the procedures which must be followed to set pay phone rates and, arguably, definitively establishing that the rates paid by the TPOA were excessive. There is little reason for BellSouth being allowed the free use of the TPOA's money after this date.

Finally, at the very least, the TPOA is entitled to an award of prejudgment interest beginning October 25, 2000, the date on which the TRA heard this matter on the merits. TPOA should not be further injured through any delay in the final resolution of this long overdue proceeding.

IV.

CONCLUSION

For the foregoing reasons, the TPOA respectfully requests that this motion for prejudgment interest be granted.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 

Henry Walker

414 Union Street, Suite 1600

P.O. Box 198062

Nashville, TN 37219

(615) 252-2363

*Attorney for Tennessee Payphone Owners
Association*

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2000, a copy of the foregoing document was served on the parties of record, via U.S. Mail, addressed as follows:

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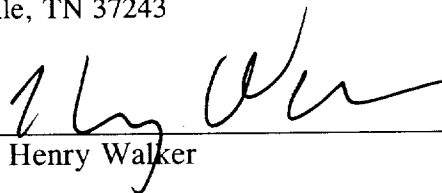
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Nashville, TN 37243


Henry Walker

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT REC'D TN
REGULATORY AUTH.

NASHVILLE, TENNESSEE

IN RE: ALL TELEPHONE)
COMPANIES TARIFF FILINGS)
REGARDING RECLASSIFICATION)
OF PAY TELEPHONE SERVICE AS)
REQUIRED BY FEDERAL)
COMMUNICATIONS COMMISSION)
(FCC) DOCKET 96-128)

Docket No.: 97-00409

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OFFICE OF THE
EXECUTIVE SECRETARY

INITIAL ORDER FOR EXTENSION OF TIME

This matter came before the Tennessee Regulatory Authority (the "Authority") through the Hearing Officer in this matter, Lynn Greer, for approval of an Agreed Motion¹ for continuance of the proceedings and postponement of the dates for Hearing.

The Report and Recommendation of the Hearing Officer, filed September 24, 1997, set the date for Hearing on this matter as May 21-22, 1998. A copy of this Report and Recommendation is attached as Exhibit A. The Report and Recommendation was approved by the Authority at a regularly scheduled Directors' Conference on October 7, 1997. On March 4, 1998, Tennessee Payphone Providers Association ("TPOA"), filed an *Agreed Motion for Continuance* on behalf of all of the Parties in this proceeding. According to the Motion filed by TPOA, the Parties have agreed to this Motion contingent upon the setting of a new date certain for the Hearings. TPOA, therefore, included in its Motion a request for a Pre-Hearing Conference. A copy of the March 4, 1998, Motion is attached as Exhibit B.

In support of its Agreed Motion, the Parties, through TPOA, stated the reasons for the continuance as:

¹ All Parties to the proceeding independently confirmed their agreement to the continuance.


a) This case involves the determination, among other things, of the "cost" to BellSouth of providing an access line to a public telephone. The case was originally scheduled to be heard in 1997 but was postponed, by unanimous consent, until May. The purpose of that delay was to allow the TRA to complete the "permanent pricing" and "universal service" proceedings which also involve the determination of the costs of various BellSouth services, including the costs of facilities used to serve public telephones.

b) The Parties agreed that the decisions in the two other dockets would influence the outcome of the present proceeding.

The Hearing Officer finds that this Motion will not prejudice any Party, but will require the Hearing schedule in this Docket to be revised. Therefore, the Hearing Officer grants the Agreed Motion. Further, the Hearing dates in this matter of May 21-22, 1998, are canceled. The Proposed Hearing Schedule shall be modified at a Status Conference to be held on May 21, 1998, at 9:00 A.M., in the Hearing Room of the Authority.

IT IS THEREFORE ORDERED THAT:

1. The Agreed Motion for Continuance of the Hearing schedule is approved;
2. The Hearing dates of May 21-22, 1998, are canceled;
3. The revisions to the Procedural Schedule from the granting of this Motion shall be the subject of a Status Conference to be held May 21, 1998, at 9:00 A.M.; and
4. Any party aggrieved with the Authority's decision in this matter may file a petition for reconsideration with the Authority within ten (10) days from and after the date of this Order.


CHAIRMAN LYNN GREER
AS HEARING OFFICER

ATTEST:


EXECUTIVE SECRETARY

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

September 24, 1997

EXHIBIT SECRETARY

IN RE: All Telephone Companies Tariff Filings Regarding
Reclassification Of Pay Telephone Service As Required By
Federal Communications Commission (FCC) Docket
96-128.
Docket No. 97-00409

FOURTH REPORT AND RECOMMENDATION OF THE HEARING OFFICER

A status conference was held in the above-captioned matter on September 23, 1997, at 12:00 noon, in Nashville, Tennessee before Chairman Lynn Greer acting as Hearing Officer pursuant to the Tennessee Regulatory Authority, hereinafter referred to as "the Authority", Order of May 2, 1997.

The purpose of the status conference was to entertain any settlements, determine a procedural schedule for the completion of this docket, and entertain any requests for additional discovery by the parties, in accordance with T.C.A. §4-5-306.

The parties agreed that there had been no settlements on any of the issues at this time.

The parties determined that the procedural schedule would be:

April 8, 1998	Direct Testimony
April 22, 1998	Rebuttal Testimony
May 6, 1998	Surrebuttal Testimony
May 21 and 22, 1998	Hearing
May 29, 1998	Post-Hearing Briefs (if necessary)
June 16, 1998	TRA Decision

No party requested any additional discovery at this conference.

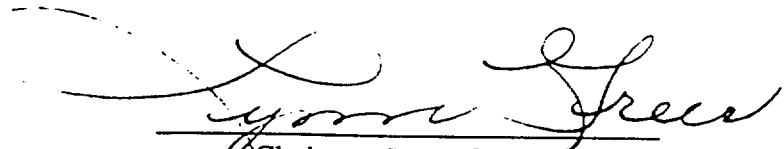

Chairman Lynn Greer

Exhibit A

RECEIVED

MAR 05 1998

TN REGULATORY AUTHORITY
GENERAL COUNSEL'S OFFICE

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March 4, 1998

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K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37219

Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay
Telephone Service As Required By Federal Communications Commission
(FCC) Docket 96-128

Docket No. 97-00409

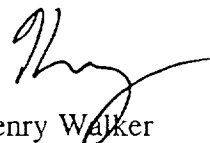
Dear Mr. Waddell:

Enclosed for filing please find an original and thirteen copies of an Agreed Motion
for Continuance in the referenced matter. Copies have been served on all known parties of record.

This matter has been referred to Chairman Greer to act as hearing officer. I
therefore presume that this agreed motion for a continuance should also be referred to him for
consideration.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry Walker

HW/dc
Enclosures

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service As Required By Federal Communications Commission (FCC) Docket 96-128

Docket No. 97-00409

AGREED MOTION FOR CONTINUANCE

The Tennessee Payphone Providers Association ("TPOA") requests that the above-captioned proceeding, now scheduled for hearing in late May, be postponed until after the Tennessee Regulatory Authority has issued final orders in the "permanent pricing" docket (TRA Docket 97-01262) and in the "universal service" proceeding (TRA Docket 97-01262).

The other parties to this proceeding have stated that they have no objection to this request as long as the matter is continued to a date certain. For that purpose, TPOA asks that a pre-hearing conference be convened to re-set the procedural schedule.

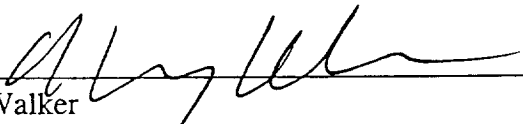
Discussion

This case involves the determination, among other things, of the "cost" to BellSouth or providing an access line to a public telephone. The case was originally scheduled to be heard in 1997 but was postponed, by unanimous consent, until May. The purpose of that delay was to allow the TRA to complete the "permanent pricing" and "universal service" proceedings which also involve the determination of the costs of various BellSouth services, including the costs of facilities used to serve public telephones. All the parties agreed that the decisions made in those two other dockets would influence the outcome of the present proceeding.

Furthermore, the parties agreed to the postponement because, in accordance with directions from the FCC, whatever rates are fixed by the TRA in this proceeding will be retroactive to April, 1997. Therefore, no party is prejudiced by delay.

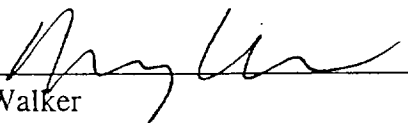
Because of delays in permanent pricing and universal service proceedings, it is now apparent that the TRA will not complete those proceedings until mid to late summer. It makes little sense, therefore, to proceed with the pay telephone docket in May. As the parties remain protected by the FCC's order making the rates retroactive, all agree that a further postponement to a date certain in the future is necessary and appropriate.¹

Respectfully submitted,


Henry Walker
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded, via U.S. Mails, postage prepaid to all parties of record this 4th day of March, 1998.


Henry Walker

¹Continuation of this proceeding also involves postponement of BellSouth's tariff filing no. 97-07641 concerning directory assistance charges to pay telephone providers. The agency has suspended the tariff and combined it with the above-captioned proceeding. BellSouth has stated that they do not object to continuing both cases to a date certain in the late summer.